sad. The remains of an ancient aqueduct stretching its numberless arches through the waste, would recall the multitudes that once found health in its waters. The occasional fragments of the rude architecture of the middle ages, would give token how long an interval has elasped, since the last possessors of the soil were compelled to desert it. Or a gibbet, still bearing the shrunk and blackened remains of some miserable wretch, whom this very desolation has tempted to guilt, or a few half savage shepherds, decrepit in youth, pale, haggard and livid, who, indeed, may have survived the poison of one season, but have hardly courage enough left to ask strength from heaven to drag their weary existence beyond another, would still announce the whole waste as the peculiar abode of desolation and death.

These are the feelings and impressions, which prevail over all others in the deserts of the Campagna. Rome, indeed, with the cupola of St Peter's, and the tomb of Adrian, may rise gradually in the horizon, like 'a glorious apparition.' But Rome, too, is already within the influence of that mysterious agent, which is spread everywhere around the remains of its temples and tombs, as an invisible enemy, whose approach no intimation announces, and no power can resist. That this enemy will at last triumph, its past progress does not permit us to doubt. Rome herself already stands in widowed greatness amidst the desolation of the Campagna; and its soil, which for so many centuries teemed with splendor and power, seems now to be emancipating itself by its own secret energies, and demanding to lie fallow of glory as many ages as it bore its burden.

ART. XI.—*A Treatise on the Practice in the Supreme Court of New York in Civil Actions, together with the Proceedings in Error.* 2 vols. 8vo. pp. 1231. New York, 1821, 1823.

THE first volume of this work has been some time in the hands of the professional public, and we now avail ourselves of the occasion furnished by the publication of the second volume, to bring it to the notice of our readers.

The object of the book is sufficiently explained by the title. As the practice of the state of New York in civil procedure is founded mainly on that of the English Court of Common law, Mr Dunlap has adopted the treatise of Mr Tidd on the *Practice of the Court of King's Bench and Common Pleas*, so far as the subject matter of that work extends, as the basis of his own work; has adapted it to the peculiar mode of proceeding in this country; and engrafted upon it the materials furnished by the statutes, rules of court, and judicial decisions of that state, for the use of whose practitioners it was principally intended. But he has, at the same time, resorted to the original authorities from which preceding compilers have drawn; and, in respect to the important subject of real and mixed actions, has written an entire new treatise.

It would be a gross mistake to suppose, that the work is confined to the subject of *Practice*, strictly so called. Many other heads of the law connected with this main subject have been touched upon; and some of them thoroughly examined, and developed with an accuracy, precision, and extent of learning, which does great credit to the talents and attainments of the author. Even in those states of the Union, where the rules of English practice have been more widely departed from, than in the state of New York, it will be found extremely useful, as containing a great body of well digested information on the law of actions, and pleadings, and several analogous topics. These, and some other parts of the work of a more theoretical character, may not indeed convey any novel instruction to the experienced lawyer and practitioner; though even this class of persons may find it convenient, as a methodical and well arranged compilation, containing all, or very nearly all, the authorities bearing on the particular title, and especially the decisions of our American tribunals; saving them the labor of much research and investigation, and refreshing the memory oppressed with the grievous burden of dry technical rules, connected with each other only by slight analogies, and containing nothing similar to those original principles of justice and equity, on which the legal mind delights to fasten, and to trace through all their ramifications. But students, and young practitioners, may obtain from these parts of the work elementary knowledge of a very important

nature, and conveyed in a manner better accommodated to their use, than in any other work, which has appeared in England or in this country. By such, the whole book should be diligently studied. *Nocturna versate manu, versate diurna.* The parts to which we now more particularly refer, besides the merit of their execution, are expressly adapted to our own legal institutions; and are not, like the English works on these branches of law, filled with matter wholly useless to the American reader.

In order to illustrate what we have said, respecting the general and diffusive utility of the work before us, it is necessary to make the following short analysis of its principal contents, passing over such parts as contain only the mere rules of practice, with their applications to the various incidents in the progress of a suit.

The work commences with the theory and practice of personal actions, and pursues that subject exclusively, to the termination of the suit by judgment and execution. Thus, the First Chapter treats *Of the several personal Actions, and of the Time limited for the Commencement of them.* It is divided into three sections. 1. Personal Actions. 2. Of the Parties to Personal Actions. These two sections may be regarded as an abridgment of the first chapter of *Chitty on Pleadings*, incorporating the leading decisions of our own Courts under their appropriate heads. 3. On the Limitation of Actions, and contains a summary of the principal points on the interpretation of the statute of limitations, and on the analogous doctrine of the presumption of payment. The following chapters on the declaration, pleas, replication, and subsequent pleadings, and demurrer, embrace the main principles of the law of pleading, and leave little to be sought for from other sources of information. The chapter on the *Trial and its Incidents* contains also the leading points respecting bills of exceptions, demurrers to evidence, nonsuits, verdicts, and special cases. The two chapters on *Judgment* and on *Execution* contain, also, much useful elementary learning relative to fraudulent transfers of property, and the lien and priority of judgments and executions; gaol liberties and escapes; of discharges under the local insolvent laws, and the questions which have arisen respecting their validity under the constitution of the United States. Then follows a chapter on the

action of ***Replevin***, (the peculiar nature of the proceedings in which, rendered it proper to treat of it distinct from other personal actions,) in which the author has evidently been much assisted by a late English work, viz. *Archbold on the Practice of the Court of King's Bench.*

This is succeeded by three chapters on the only species of ***Real Actions***, which are still preserved in use in the state of New York. 1. The Writ of Right. 2. Dower. 3. Partition. The two first of these chapters appear to be compiled principally from Serjeant Williams' notes on Saunders' Reports. The Reports of New York throw little light on those obscure subjects. But the practice under them is familiar in the Courts of this Commonwealth, in the western states, and in those of the Union whose practice is modelled on the local laws of the states, where these forms of action have been adopted and continued in use. These two chapters are concise, but they contain nearly everything, that can be material in practice under the statutes on which they comment. If the learned author had gone further than he has attempted to proceed, he would perhaps have involved himself in speculations, which, though they might have been instructive and interesting to the general lawyer, might possibly have tended to mislead the student by confounding theory with practice.

While speaking on the subject of Real Actions, we cannot refrain from suggesting to the enlightened legislators of those states, which think proper still to retain them in use, the expediency of placing them on a more convenient and rational footing. Although the rude product of a comparatively barbarous age, and partaking very much of the peculiarities of the feudal law, there are several species of those actions, whose extreme simplicity and precision admirably adapt them for the trial of cases involving the title to real property. Let the legislature of New York emulate the example set them by that of Massachusetts, and abolish some of the absurd and embarrassing proceedings in the writ of right, by substituting a trial by a common jury, for the ludicrous attempt to imitate the English grand assize, with its complicated machinery of ***Electors***, who were to be '*four lawful knights of your county, girt with swords*,' but for whom the legislature of New York has already had the

laudable courage to insert '*four good and lawful men of your county.*' Let them go on boldly in the plain path of sensible innovation, and establish a set of specific remedies, whether droitural or possessory actions, simple in their process and pleadings, telling the honest truth of the demandant's case in language intelligible to all men, and proceeding directly to determine and adjudge conclusively the right of the parties to the possession or proprietary interest of the thing in controversy.

That excrescence, the action of ejectment, which has covered the whole law of real property with its parasitic growth, would then be restricted and confined to its original and appropriate office, the recovery of a term of years; and as the writ and declaration in all real actions must state the demandant's title, the tenant or defendant would in every instance know what it is he has to contest, and good pleading, in which, we are told, the symmetry of the common law consists, would be cherished and preserved. We may remark, also, that perhaps that part of the statute of New York for regulating trials upon writs of right, which requires the 'four good and lawful men,' (who were to represent the 'four good and lawful knights girt with swords,' and who were to elect the grand assize,) to be such as are 'duly qualified to vote for senators according to the constitution of this state,' may have been rendered nugatory by the new constitution of 1821, which abolishes the freehold qualification for electors of the Senate. This however we refer, together with the rest of the matter, to the able jurists of that state, humbly craving their pardon for having meddled with a subject, which may seem to be beyond the limits of our critical jurisdiction.

To return to Mr Dunlap's work. The chapter on the proceedings for compelling partition of lands, is little more than a transcript of the local statute regulating those proceedings. We are told, that the Supreme Court of the state has never carried into effect the intention of the law makers, which was to guard with a vigilant eye the interests of the parties, but has in part suffered the most material provisions of the statute to sleep, by allowing rules to be taken in partition without examination, and of course. The Court was bound to see, that every proceeding in the cause was regular.

in the first instance, and not to leave it open for discussion at a subsequent stage of the proceedings, or in a future action of ejectment. However, it would seem, that the statutory action of partition is in a great measure superseded by the more simple and expeditious remedy of a bill in equity, which applies, in every case, where the legal title does not come into discussion.

There is a full chapter on the action of ejectment, which is principally taken from the very valuable treatise of Adams, a writer who has entered largely into the subject of titles, and of the evidence necessary and pertinent to support the claims of the respective parties. It is obvious, that a work purporting to be a book of practice could not go very extensively into discussions of that nature; still it contains many things, which the student will find extremely useful, especially as it refers to the most important American decisions.

As writs of *scire facias* and error are applicable to actions of every description, they are reserved for the conclusion of the work.

Very full and complete *Addenda and Corrigenda* are given, containing the local statutes passed, and cases adjudged, whilst the work was going through the press, and such other matters as had been overlooked in its progress.

We have spoken of *Archbold's Practice*. This is doubtless a very excellent work, and Mr Dunlap appears to have derived considerable assistance from it; but as regards the state for whose use his work was designed, it has almost entirely superseded all other treatises on English practice. As to the sources from which he has mainly derived the information conveyed to his readers, besides those we have already mentioned, they are principally the different constituent parts of the practice of New York. These are

1. The statutes of the state, as the statutes of jeofails, for the amendment of the law, &c. most of which are transcribed from the English statutes; the text of which has generally been preserved, on account of its having received a settled judicial construction; though it sometimes has been changed, perhaps not always for the better.

2. The statute law of the Supreme Court of the state, which is a Court of original jurisdiction; that is, its general

rules, which constitute a very essential part of the local system, and fix its *form* in a number of the most important particulars. The author has generally, and very properly, introduced the statutes and rules of court *verbatim.*

3. The decisions of the Court, as ascertained in the voluminous Reports of Mr Johnson and others, which have reflected such a lustre on the jurisprudence of the state. It seems that a decision of the Supreme Court, whether in conformity or in opposition to the English practice, has always been regarded as conclusive, and of course English authorities are wholly unnoticed in such cases.

4. The practice of the Court of King's Bench, as contained in its Reports, or in elementary treatises and compilations of established reputation. The Supreme Court of New York, as well as that of the United States, has said that it will follow the practice of the King's Bench in all cases not provided for by statutes, or by its own rules. Of the English Reports, the most valuable and authoritative, on this subject, are those of the latter half of the last century. The author has, however, noticed the decisions of the King's Bench down to the third volume of Barnwall and Alderson inclusive.

5. The usage of the Court, as ascertained from observation and the information of skilful practitioners. This usage may have been founded on, or sanctioned by express decisions of the Court, at some period since it was first established in 1691, but its present authority rests merely in tradition and universal acceptation.

It did not fall within the plan of the author to notice those parts of the English practice, which have been altered or retrenched in the system of which he treats. Although we, who are accustomed to a more concise, direct, and simple course of proceedings, may think it still too complicated and unwieldy; yet those who are familiarly acquainted with the English forms cannot but be struck with the comparative brevity, neatness, and facility of those of New York and the other states, which have adopted a similar system; advantages which have been obtained almost without any sacrifice of those great leading principles, which constitute the foundation of the common law practice and pleading.

The author has executed his laborious task with an accuracy and extent of learning, which support his well earned reputation as a lawyer, and we are well pleased to learn, that the work has been received in the most flattering manner by the bar for whose use it was principally intended. Nor, as we have before hinted, is its utility confined to that sphere. Every professional man, under whatever system he may practice, will derive from it much valuable instruction, delivered with a luminous method, and in a clear and perspicuous style.

We have been disappointed in not being able to obtain for insertion in our present number, a review of Mr Phillips's work on the Law of Insurance. We regret this the more, as we understand the work is highly approved by the best judges, and is one with whose merits the professional public ought to be extensively acquainted. Hereafter we hope to render it suitable justice.

A review of a 'Residence in Chili' is necessarily postponed till the next number.